U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 June 2004

Case No.: 2004-SOX-17

In the Matter of:

PETER N. MICHAELSON

Complainant

v.

OFFICEMAX, INC.

Respondent

BEFORE: RUDOLF L. JANSEN
Administrative Law Judge

ORDER DISAPPROVING SETTLEMENT AGREEMENT

The parties have submitted for my review a Settlement Agreement and Release of Claims. The Agreement is signed by both the Complainant and a duly authorized representative of the Respondent together with their respective attorneys.

The Agreement and Release consists of thirteen well defined paragraph provisos. Paragraph nine acknowledges that the Agreement and Release are the entire Agreement between the parties. It also includes the following:

> Further, the parties agree that if any provision herein is declared invalid by a court of competent jurisdiction, such invalidation shall not affect the remaining provisions of this Settlement Agreement and Release of Claims, which shall remain in full force and effect. This Settlement Agreement and Release of Claims may not be amended except by a writing signed by all the parties.

In reviewing a settlement agreement under the whistleblower statutes, the Secretary must consent or not consent to the terms of a proposed settlement as written, and cannot sever a term and enforce the remainder of the Agreement, without the consent of both parties. *Macktal v. Secretary of Labor*, 923 F.2d 1150, (5th Cir. 1991)("Macktal I"). In its Decision, the Fifth Circuit vacated the Secretary's Order and remanded the case to the Secretary for further consideration. The Secretary then issued a new Order disapproving the settlement and remanded the case to an Administrative Law Judge for hearing on the merits. An Administrative Law Judge then issued a Recommended Decision and Order granting Employer's Motion for Summary Judgment upon the basis that internal complaints could not be considered as support for a retaliation claim. The Administrative Review Board affirmed the Administrative Law Judge's findings and concluded that Macktal had not engaged in any protective activity under the ERA. That Decision in turn was appealed to the Fifth Federal Circuit which ultimately concluded the matter by affirming the Administrative Review Board's dismissal of the complaint. *Macktal v. U.S. Department of Labor*, 171 F.3d 323 (5th Cir. 1999)("*Macktal II*"). *Macktal* then sued his attorneys for malpractice and that suit also failed. *Macktal, Jr. v. Garde et al, U.S. District Court, District of Columbia,* 111 F.Supp.2d 18 (2000)

Procedures for the handling of discrimination complaints under Sarbanes-Oxley are found at 29 C.F.R. Part 1980. Those procedures direct the applicability of the procedural rules of this office which are found at 29 C.F.R. Part 18 excepting as to procedures directed by Part 1980. Section 1980.107(a). The Sarbanes-Oxley regulations provide guidelines for the handling of adjudicatory settlements. Section 1980.111(d)(2). That provision requires the filing of a settlement agreement with the Administrative Law Judge for approval and the Judge's Order constitutes the final Order of the Secretary. Section 1980.111(e). The method of application of the Part 18 procedural rules is dependent upon the Settlement Agreement content. *Simmons v. Arizona Public Service*, 90-ERA-6 (Sec'y Sept. 7, 1994). I have now had an opportunity to review the Agreement in this case. Since the Agreement reveals a general absence of stipulated factual findings to support legal conclusions relevant to the issues in the case, I conclude that the provisions of 29 C.F.R. § 18.9(b) and (c) do not apply.

The *Macktal* case involved an Energy Reorganization Act, 42 U.S.C. § 5851 matter. The applicable statute provides that unless the case is settled, that the Secretary, within a certain

period of time, must "issue . . . an order either providing the relief prescribed by subparagraph (B) or denying the complaint." The Court in *Macktal I* interpreted the statute to mean:

> Once a complaint is filed, the statutory language authorizes only three options:
>
> 1. An order granting relief;
> 2. An order denying relief; or
> 3. A consensual settlement involving all three parties.

Under Sarbanes-Oxley, procedures are governed under the rules and procedures set forth in section 42121(b) of Title 49, United States Code. 18 U.S.C. § 1514A(b)(2)(A). The reference in the statute is to Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, Public Law 106-181, 49 U.S.C. § 42121 (AIR 21). At § 42121(b)(3)(A) of Air 21, the statute provides nearly identical terminology as that used in the Energy Reorganization Act whereby it states:

> . . . the Secretary of Labor shall issue a final order providing the relief prescribed by this paragraph or denying the complaint.

Authority is also provided for the termination of a proceeding based upon a settlement agreement entered into by all of the parties. In view of the statutory provisions included within the Energy Reorganization Act, Sarbanes-Oxley and the AIR 21 statute, *Macktal* clearly applies directly to this case.

The provision of the Agreement and Release requiring a signing by all parties in the event of an amendment together with application of the Court's Decision in *Macktal I* requires the disapproval of the Settlement Agreement and Release of Claims submitted for approval in Michaelson. A written statement of acceptance from the parties is required which acknowledges approval and adoption of the modifications noted below. Pursuant to *Macktal I*, I have no authority to force the parties to accept a settlement or to add a material condition to the Agreement which one or the other of the parties may not have been able to secure through negotiations.

The Agreement discharges Respondent from any claims involving multiple other state and federal laws. The Secretary's authority over settlement agreements is limited to those statutes which are within the Secretary's jurisdiction and

are defined by the applicable statute. *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86-CAA-1 (Sec'y Nov. 2, 1987). Therefore, this review is limited to a determination as to whether the terms of the Agreement represent a fair, adequate and reasonable settlement of the Complainant's allegations concerning the Sarbanes-Oxley Act violations during the applicable period.

The Agreement also includes a release provision whereby Complainant discharges Respondent from any responsibility "of whatsoever kind or nature, which he may now have or may now or hereafter assert . . ." against Respondent growing out of or resulting from his employment with Respondent. To the extent that the provision can be interpreted to include a waiver of Complainant's rights based upon future Employer actions, the provision is contrary to public policy. The provision is interpreted as limited to a waiver of the right of Complainant to seek damages in the future based upon claims or causes of action arising out of facts occurring prior to the date of the Agreement. *Polizzi v. Gibbs and Hill*, 87-ERA-38 (Sec'y July 18, 1992); *Pace v. Kirshenbaum Investments*, 92-CAA-8 (Sec'y December 2, 1992).

The Agreement also contains a confidentiality provision whereby Complainant agrees that the terms are to remain completely confidential and that he will not reveal, publicize, communicate or otherwise make public the terms of the agreement unless required to do so "under penalty of law." For purposes of this agreement, this provision is void as being contrary to public policy and unenforceable to the extent that it could be construed as restricting the Complainant from communicating voluntarily with or providing information to any federal or state governmental agency.

Also, I interpret the phrase "under penalty of law" as being highly inclusive. I do not view it as preventing the disclosure of information or documents relevant to governmental investigations or proceedings under Sarbanes-Oxley or any other environmental whistleblower statute, or under other federal or state laws, rules or regulations. *Stites v. Houston Lighting and Power*, 89-ERA-1 (Sec'y March 16, 1990) (Order to Consolidate and to Show Cause).

The Freedom of Information Act, (FOIA) 5 U.S.C. § 552 (1982) requires federal agencies to disclose requested records unless the records are exempt from disclosure under that Act. In *Seater v. Southern California Edison Co.*, 95-ERA-13 (ARB March 27, 1997) the following standard was applied in

determining the susceptibility of the Settlement Agreement to a FOIA request. It was stated:

> The records in this case are agency records which must be made available for public inspection and copying under the FOIA. In the event a request for inspection and copying of the record of this case is made by a member of the public, that request must be responded to as provided in the FOIA. If an exemption is applicable to the record in this case or any specific document in it, the Department of Labor would determine at the time a request is made whether to exercise its discretion to claim the exemption and withhold the document. If no exemption were applicable, the document would have to be disclosed. . . .

That same standard would apply in determining the potential for disclosure of the Settlement Agreement and Release of Claims here.

The Agreement also contains a provision providing that it is to be governed by the laws of the state of Ohio. I interpret this provision as not restricting in any way the authority of the Secretary to bring any type of an enforcement action under applicable law nor as limiting the jurisdiction of the U. S. District Court to grant all appropriate relief as identified in Sarbanes-Oxley. *Stites v. Houston Lighting and Power*, 89-ERA-1 and 89-ERA-41 (Sec'y May 31, 1990); *Bivens v. Louisiana Power and Light*, 89-ERA-30 (Sec'y July 8, 1992). *See* 29 C.F.R. §1980.114.

In view of the above, IT IS ORDERED that the Settlement Agreement and Release of Claims filed by the parties on May 21, 2004 is hereby rejected since it is subject to amendment and interpretation as indicated and any modification of material terms in a negotiated settlement requires the consent of the parties. The parties will have until July 14, 2004 to submit an amended Settlement Agreement and Release of Claims embodying the amendments and interpretations noted. In the alternative, a statement signed by each of the parties together with counsel expressing agreement with the comments noted and which incorporates those comments by reference into the existing Agreement would also be acceptable. If the parties are unable

to reach an Agreement addressing the issues raised by this Order, I should be advised no later than July 14, 2004 and the case will be scheduled for hearing.

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Rudolf L. Jansen
Administrative Law Judge